Supreme Court
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No. 93-133

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

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MAXIMILLIAN ROBERTO SEALE, Petitioner,

v.

STATE OF UTAH, Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

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## QUESTIONS PRESENTED

Whether petitioner was denied the effective assistance of counsel where counsel chose to advance an insanity defense unsupported by the law, the evidence, and petitioner's own testimony.

Whether petitioner who intended to assert a defense based upon his innocence was denied the assistance of counsel in the presentation of the defense which he had elected to assert where counsel on his own initiative pursued alternative pleas of not guilty by reason of insanity.

Whether petitioner waived the right to control the theory of his defense and his right to the assistance of counsel in the advancement of his chosen defense by failing to make a contemporaneous objection to conduct on the part of his counsel.

## LIST OF PARTIES

The parties to the proceedings below were petitioner, Maximillian Roberto Seale who was the criminal defendant in proceedings initiated by respondent, State of Utah, in Washington County Criminal No. 891502035 FS.

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R.[page] -- denotes pages of the court file.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

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MAXIMILLIAN ROBERTO SEALE, Petitioner,

v.

STATE OF UTAH, Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

---

Petitioner, Maximillian Roberto Seale, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Utah entered in the above-entitled proceeding on February 24, 1993, and from which a timely Petition for Rehearing was denied on May 28, 1993.

## OPINIONS BELOW

The opinion of the Utah Supreme Court is not yet reported in the Pacific Reporter or Utah Reporter, but was reported informally at 207 Utah Advance Reports 10

(March 9, 1993), and is reprinted in the Appendix hereto, pp.A1-A56, infra. The order denying the timely petition for rehearing is reprinted in the Appendix hereto, p.B1, infra. Inasmuch as the appeal from the trial court was a direct appeal to the Utah Supreme Court the opinion of the Utah Supreme Court constitutes the only opinion below. The trial court did not deliver any written opinion.

## JURISDICTION

The judgment of the Supreme Court of the State of Utah was entered on February 24, 1993. The Utah Supreme Court denied a timely petition for rehearing on May 28, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The issues presented by this petition are constitutional in their dimension

specifically relating to petitioner's right to the effective assistance of counsel as guaranteed by the Sixth Amendment to the Constitution of the United States and made applicable to the states by the Fourteenth Amendment. The Sixth Amendment, in relevant part, states: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of counsel for his defence."

In evaluating one aspect of counsel's performance the provisions of Utah Code Ann. §76-2-305(1) are relevant. That section provides:

> It is a defense to a prosecution under any statute or ordinance that the defendant, as the result of mental illness, lacked the mental state required as an element of the offense charged. Mental illness is not otherwise a defense.

## STATEMENT OF THE CASE

Petitioner and Alice Chapman[1] became acquainted in 1986. T.270. In late 1986 or early 1987, petitioner moved into a residence in Washington City, Utah, where Chapman lived with her three minor daughters, J.W., P.W. and D.W. T.149. In April 1987, Chapman and her daughters moved with petitioner to his residence in Hurricane, Utah. T.148. They resided with petitioner until sometime between November 1988 and January 1989. T.149.

In June 1989, the children went to Idaho to spend the summer with their father and Chapman's former husband, Randy Williford. T.123. When the time came for the girls to return home to their mother, J.W. apparently expressed some reluctance. Cheryl Vanleishout, Williford's sister, took

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[1]Alice Chapman was known as Alice Williford when she and Petitioner first met. At trial she testified under the name of Chapman and she is referred to by that name for the sake of continuity.

J.W. for a walk for the purpose of discussing her concerns about returning to her mother's home. T.137-138. In the course of that conversation J.W. expressed some concerns about petitioner. J.W. initially denied that petitioner had abused her. Vanleishout then told J.W. that Vanleishout's own father had abused her when she was a child and then asked if petitioner had abused J.W., the child stated that he had. T.138.

Vanleishout and Williford then took P.W. aside and told her what J.W. had said about petitioner. Vanleishout would later testify: "[P.W.] was kind of -- acted kind of shy and didn't really say much. It took a bit of coaxing to try to get her to talk". T.144. Eventually, P.W. did make a statement against petitioner and later, participated in a videotaped interview in Jerome, Idaho. T.93.

Shortly thereafter, petitioner was

arrested and charged with several felony offenses alleging rape of a child, sodomy on a child, and sexual abuse of a child. The rape and sodomy charges related to J.W. and the abuse charges related to both girls. R.5-10.

Petitioner was committed to the Utah State Hospital for the purpose of evaluating his competency to proceed. T.228; R.30-31. The trial court initially concluded that he was not competent to proceed and petitioner remained in the state hospital until February 1990. T.233; R.44-45. In March 1990, petitioner was returned to the hospital for the purpose of evaluating his mental state at the time of the alleged offenses. T.235; R.53.

Throughout the pretrial proceedings and the trial, petitioner steadfastly maintained his innocence and denied that he was or ever had been mentally ill. T.237, 269-290. Upon arraignment in the trial court

petitioner entered a plea of "not guilty". T.6 (arraignment). Defense counsel then asked that alternative pleas of "not guilty by reason of insanity" be entered on petitioner's behalf on each count. T.6-7 (arraignment).

At trial J.W. testified to three incidences of abuse. The state then called P.W. who identified petitioner and acknowledged having lived with him for a period of time. T.81-82. She testified that she did not think that petitioner had ever taken her clothes off and did not remember petitioner ever touching her private parts. T.86. She further testified that she did not remember telling anyone that petitioner had abused her. T.86. Her videotaped statement was played to the jury. T.205.

The sodomy charge was dismissed when the state failed to present any evidence in support of that charge. T.213-214.

After the state rested defense counsel

called Robert J. Howell, a clinical and forensic psychologist who had examined petitioner at the Utah State Hospital. Howell testified that in his opinion petitioner was mentally ill at the time the offenses were allegedly committed, T.238-239, but stated that the mental illness would not have deprived petitioner of the ability to form the intent to commit the offense. T.241, 244-245, 259. At no time did Dr. Howell offer an opinion which would have provided any support for an insanity defense under present Utah standards or under the "substantial capacity" standard of the former Utah statute.

According to Dr. Howell, petitioner had steadfastly maintained his innocence and denied that he had ever suffered from any mental illness. T 237, 253, 257.

The prosecutor used the cross-examination of Dr. Howell as a vehicle for introducing hearsay testimony regarding

petitioner's alleged use of illegal drugs. T 250-253. Dr. Howell conceded that in the course of his investigation and in forming his opinion, certain third parties had made statements to him regarding petitioner's alleged use of illegal drugs. T.251-253.

Petitioner then took the stand and denied that he had ever abused any of the children. T.278-279, 289. Furthermore, he denied that he was suffering from any mental illness or that he had suffered from any mental illness during the time frame in which the offenses were allegedly committed. T.274-275.

On cross-examination, the prosecutor questioned petitioner regarding his alleged use of illegal drugs, an issue which had relevance only to Dr. Howell's opinion regarding mental illness. T.282, 290. The prosecutor then asked petitioner if he had ever sold marijuana out of his house. T. 290. All questions regarding drugs drew

denials from the petitioner. T.282, 290.

In rebuttal, the prosecutor called J.W. who testified that when she lived with petitioner, he and Chapman used marijuana on a weekly basis. T.293-294.

Notwithstanding the fact that no evidence had been introduced supporting an insanity defense, the trial court allowed defense counsel to argue insanity and submitted the case to the jury with instructions and proposed verdict forms which addressed the defense of insanity. The court's instructions advised the jury of the current standard relating to the defense. R.156-158, 178-185.

In closing, defense counsel argued that the evidence was insufficient to warrant conviction and argued that petitioner had a mental illness which "protects him from being found guilty for crimes he may have committed while under the influence of that mental illness." T.308, 314-315. The jury

returned a verdict of guilty on all counts. T.327-328; R.178-185.

Petitioner was sentenced to a term of five years to life in the Utah State Prison on the rape conviction and terms of three years to life each on the sexual abuse convictions, the sentences to run concurrently. R.240-244.

Petitioner appealed to the Utah Supreme Court asserting numerous errors including the denial of effective assistance of counsel. The Utah Supreme Court affirmed. State v. Seale, No. 910010, filed February 24, 1993.

The Utah Supreme Court rejected petitioner's claim of ineffective assistance of counsel concluding that petitioner had waived the right to control the nature and direction of his defense.

> We acknowledge that Seale initially told the trial judge that he wished to enter a not

guilty plea and that it was his trial counsel who then requested an alternative plea of not guilty by reason of insanity. However, Seale did not object to the request, he signed the plea affidavit, and he initialed the paragraph requesting the alternative plea.

Appendix, p.A17.

Seale now argues that the written plea was impermissibly altered to include the insanity plea. The hearing transcript indicates, however, that the alteration was at least done with Seale's knowledge.

Appendix, p.A17, fn.3.

At the close of evidence, the jury was instructed that it could find Seale not guilty, not guilty by reason of insanity, guilty, or

> guilty and mentally ill for each of the seven counts submitted to them. During closing argument, defense counsel argued that Seale had been mentally ill during the incidents of abuse. The jury, however, returned verdicts of guilty on all counts.

Appendix, pp. A11-A12.

Petitioner timely sought rehearing in the Utah Supreme Court. His petition was denied on May 28, 1993. Appendix, p.B1.

REASONS FOR GRANTING THE WRIT.

To the extent that the Utah Supreme Court rejected petitioner's ineffective assistance of counsel claim based upon a conclusion that counsel's performance had been adequate, the decision of the Utah Supreme Court has decided a federal question in a way which conflicts with the decision of the Court of Appeals, District of Columbia.

To the extent that the decision of the Utah Supreme Court implies that a trial court or defense counsel may impose an insanity defense upon a competent defense, the decision of the Utah Supreme Court conflicts with decisions of the District of Columbia Court of Appeals and the United States Court of Appeals, District of Columbia Circuit as well as decisions of other state courts of last resort.

To the extent that the decision of the Utah Supreme Court is based upon petitioner's alleged waiver of the right to control the theory and direction of his defense or the waiver of the right to the assistance of independent counsel in the pursuit of the theory he choose to advance, the case presents an important question of federal law which has not been, but should be, settled by the Supreme Court.

I.

PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. INSANITY DEFENSE PURSUED BY COUNSEL WAS NOT SUPPORTED BY THE LAW OR THE EVIDENCE.

In the wake of John Hickley's acquittal of the attempted assassination of President Ronald Reagan, Utah like many other states, as well as Congress, proposed and adopted sweeping changes in the insanity defense available in criminal cases. See "Utah Legislature Survey," 1984 Utah Law Review 115, 151-158; "Insanity Law Reform," 1983 B.Y.U. L.Rev. 499, 500-506. See generally, diGenova & Toensing, Bringing Sanity to the Insanity Defense, 69 A.B.A.J. 466, 468-469 (1983). See also Insanity Defense Reform Act of 1984, Pub. L. 98-473, tit.II, ch.IV, 98 Stat. 2057 (codified at 18 U.S.C. §17).

Under current Utah law, mental illness does not provide a defense unless, as the

result of the illness, the accused lacked the mental state required as an element of the offense. See Ch. 49, §1, 1983 Utah Laws 263, 263-70 (codified at Utah Code Ann. §76-2-305 and scattered sections of id. tit. 77 (Interim Supp. 1983)). The Utah Insanity Defense Act eliminates the affirmative defense of insanity, restricting evidence of an accused's mental condition to the issue of whether he had the mens rea required for the crime charged. In this case that requisite mental state--the blameworthy state of mind--is intent.

Prior to the enactment of the current statute, Utah law applied the "substantial capacity" standard which excused a person's criminal conduct if the person lacked "substantial capacity" to "appreciate the wrongfulness of his conduct" or to conform his conduct to the requirements of law.[2]

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[2]See Utah Code Ann. §76-2-305 (1978)(repealed and reenacted as id. §76-2-305 (Interim Supp. 1983)). The language of

Petitioner pled "not guilty." He denied the allegations against him and denied that he was suffering or had suffered from any mental illness. Trial counsel, apparently convinced that petitioner was mentally ill, pursued a theory of defense which had no basis in law or fact. The evidence presented in support of the defense of insanity did not raise any issue regarding petitioner's ability to form the intent to commit the alleged offenses. Furthermore, the evidence did not establish a prima facie insanity defense under former Utah law or under any recognized legal theory of insanity.

The deficiency of trial counsel's

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Utah's prior law was almost identical to that of the Model Penal Code which states that: "a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to appreciate the criminality of his conduct or to conform to the requirements of the law. . ." Model Penal Code §4.01 (Proposed Official Draft 1962).

performance is clearly demonstrated by his advocation of an insanity defense which was not supported by existing law, not supported by the evidence, and in direct conflict with his client's own testimony.

The insanity defense opened the door to the introduction of highly prejudicial testimony regarding petitioner's alleged use of illegal drugs -- testimony which found relevance only in issues surrounding petitioner's mental state. Furthermore, the defense of insanity destroyed petitioner's credibility as a witness before he even took the witness stand. Defense counsel's questions to Dr. Howell suggested that when petitioner testified he would deny any mental illness and that this denial may itself be evidence of the disorder. T.257.

In Tillery v. United States, 419 A.2d 970 (1980, D C App), the defendant was charged with first-degree murder and defended on the basis of insanity. Sixteen

months before his trial, the District of Columbia Court of Appeals had concluded that the Durham standard of "productivity" had "outlived its usefulness" and replaced the Durham standard with the "substantial capacity" standard. Defense counsel predicated his defense strategy on the Durham standard.

The defense's expert concluded that Tillery was in fact suffering from a mental disease at the time of the offense and that the offense was the product of his disease. The government's own expert opined that the accused may have suffered from a psychotic illness during the time frame when the offense was committed but concluded that the offense was not the product of any mental illness.

Despite the fact that all of the expert opinions were presented in terms of the Durham standard, when the jury received its instructions regarding the law of the case,

they were told to decide the insanity issue under a wholly different standard.

> Appellant argues that counsel was totally unfamiliar with the Bethea ["substantial capacity"] standard at the time of trial; appellee argues that counsel was aware of the proper standard, but chose to use the Durham standard to highlight his expert's testimony. We do not need to accept either argument, however, for we conclude that, whether counsel was ignorant of the Bethea test, or knew of the standard and intentionally chose to ignore it, the use of a judicially rejected legal standard by a member of the legal profession constitutes gross incompetence.

419 A.2d at 974.

Tillery's conviction was reversed and

the case remanded for a new trial, the appellate court concluding that trial counsel's gross incompetence in the preparation, investigation, and presentation of Tillery's insanity defense "effectively blotted out a substantial defense, thereby depriving him of his Sixth Amendment right to the effective assistance of counsel." Id. at 976.

Tillery was decided under the "gross incompetence" test which was followed in the District of Columbia in 1980. See generally, Annot. 2 A.L.R. 4th 27, 134-135. The standard established in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 1051 80 L.Ed. 2d 674 (1984), adds a requirement that "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." Id. at 692.

In Strickland, this Court observed:

> Representation is an art, and

an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. . . .

On the other hand, we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case. . . .

The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result

> of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id. at 693-694.

Inasmuch as there was no evidence presented from which the jury in the instant case could have concluded that petitioner "lacked the mental state required as an element of the offense charged", the jury instructions on insanity were a meaningless gratuity. The fact that the trial court instructed the jury on the defense of insanity does not legitimize trial counsel's strategy.

The Utah Supreme Court held that the trial strategy was legitimate because: "The jury was entitled to accept [Dr. Howell's statement that there was a "real possibility" that petitioner was mentally ill when the abuse took place] and find that

Seale was mentally ill at the time of the offense . . . ." Appendix, p.A16. Counsel fails to see how such a finding could have availed petitioner anything. Indeed, if the state's prosecutor had stipulated that petitioner was in fact mentally ill at the time of the alleged offense, the result would have been the same.

Under Utah law, the presence of a mental illness is inconsequential unless "the defendant, as the result of mental illness, lacked the mental state required as an element of the offense charged." See U.C.A. 76-2-305(1)(1990). "[A] defendant now may use the insanity defense only to deny the requisite mental element of the crime rather than to excuse his conduct." Utah Legislative Survey, 1984 Utah L.Rev. 115, 155.

The case at bar does not present a situation where counsel was presented with an ethical dilemma in presenting a defense

based upon petitioner's denial of the charges. Petitioner had consistently denied all charges. Furthermore, the evidence against petitioner was not so overwhelming as to indicate that the only possible defense would be a desperate attempt to formulate a new and unfounded approach to the defense of insanity. Nevertheless, counsel pursued a defense which was nothing more than illusion.

Certainly the assertion of a frivolous insanity defense at the expense of any genuine opportunity to present a defense based upon innocence is a breach sufficient to undermine any confidence in the outcome of petitioner's trial.

B. COUNSEL'S USURPATION OF PETITIONER'S RIGHT TO CONTROL THE THEORY OF HIS DEFENSE DEPRIVED PETITIONER OF THE "EFFECTIVE ASSISTANCE" OF COUNSEL.

The analysis in Strickland v. Washington, supra, concentrated on counsel's conduct in making tactical decisions. The issue in the instant case involves a fundamental conflict between petitioner's attempt to defend on the basis of his innocence and his counsel's attempt to defend on the basis of insanity.

ABA Standards for Criminal Justice 4-5.2(a)(2d ed. 1980) states:

> Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are:
>
> (i) what plea to enter;
>
> (ii) whether to waiver jury trial; and
>
> (iii) whether to testify in his or her own behalf.

In Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed. 2d 987 (1983), this Court added a fourth prerogative -- the right to decide whether an appeal will be taken. The Court describes these matters as "fundamental decisions regarding the case" with respect to which "the accused has the ultimate authority." Id. at 751.

Once the trial court determines that the accused is competent to stand trial, "neither the trial court nor defense counsel can compel a competent defendant to present an insanity defense, no matter how strong the available evidence of the defendant's insanity at the time of the charged acts." People v. Bloom, 774 P.2d 698, 715 (Cal. 1989)(citing People v. Gauze, 542 P.2d 1365 (Cal. 1975)). See also State v. Jones, 99 Wash. 2d 735, 664 P.2d 1216 (1983).

A criminal defendant has a constitutional right to at least broadly control his own defense. In Faretta v.

California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), this Court held that a criminal defendant has a constitutional right to represent himself at trial: "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants the accused personally the right to make his defense." Faretta, at 819, 95 S.Ct. at 2533. See also North Carolina v. Alford, 400 U.S. 25, 33, 91 S.Ct. 160, 165 (1970)(quoting Tremblay v. Overholser, 199 F.Supp. 569, 570 (D.D.C. 1961)("[c]ourts should not 'force any defense on a defendant in criminal case,' particularly when advancement of the defense might 'end in disaster. . .'")).

Basic respect for an accused's individual freedom requires the court to permit the defendant himself to determine his plea. Frendak v. United States, 408 A.2d 364, 376 (D.C. 1979)(relying on "the underlying philosophy of Alford and

Faretta").[3] Although Alford and Faretta do not settle this issue foursquare, they remain the only guidance which the Supreme Court has provided.

There are a number of reasons why a criminal defendant might choose to forego a plea of insanity. See State v. Jones, supra, at 1220-1221. Note also the discussion in 2 LaFave and Israel, Criminal Procedure §11.6(b) at 61-62. "[S]uch a choice may be a wise tactical maneuver where the insanity defense conflicts with some other defense the defendant wishes to interpose . . . . He may view such a plea as a tacit admission of guilt which he does not wish to make." Jones, supra, at 1220. Indeed, in some jurisdictions an insanity plea is considered to be akin to a common law plea of "confession and avoidance". See

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[3]See discussion of Frendak in Note, The Right and Responsibility of a Court to Impose the Insanity Defense Over the Defendant's Objection, 65 Minn.L.Rev. 927, 931-934 (1981).

People v. Low, 732 P.2d 622, 629 (Colo. 1987).

Where counsel conducts the defense without regard to which theory his client wishes to advance, his representation does not constitute "assistance," much less "effective assistance".[4]

Petitioner intended to declare his innocence and hoped to present himself as one worthy of belief. The presentation of his defense was made against the background of the defense which counsel provided for him. This was a defense which invited the jury to consider petitioner's denials of mental illness as evidence of the disorder itself. This was a defense summarized by

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[4]As an example, in State v. Harbison, 315 N.C. 175, 337 S.E.2d 504 (1985), cert. denied 476 U.S. 1123, 106 S.Ct. 1992, 90 L.Ed.2d 672 (1986), the Supreme Court of North Carolina held that counsel's statement during closing argument in a murder prosecution that defendant should not be found innocent, but guilty of manslaughter, constituted per se ineffective assistance of counsel.

defense counsel's assertions that petitioner "had been mentally ill during the incidents of abuse." Appendix, p.A11.

It cannot be seriously argued that petitioner had any genuine opportunity to present a defense based upon his innocence. Nor could anyone seriously contend that counsel "assisted" him in the presentation of the defense which petitioner chose to advance.

II.

PETITIONER DID NOT WAIVE THE RIGHT TO CONTROL THE UNDERLYING THEORY AND DIRECTION OF HIS DEFENSE NOR HIS RIGHT TO THE ASSISTANCE OF COUNSEL IN THE ADVANCEMENT OF THAT THEORY.

The Utah Supreme Court rejected petitioner's ineffective assistance claim concluding that petitioner waived his right to control the underlying theory and direction of his defense and the right to the assistance of independent counsel in

pursuing his chosen theory of defense by his failure to interpose a contemporaneous objection to defense counsel's entry of the insanity plea on his behalf. Appendix, pp.A16-A17.

Questions involving the waiver of the right to counsel have generally arisen in cases where the accused has made his way through the judicial process without the benefit of any counsel. In order to be valid in that context, a waiver of counsel must be made "knowingly and intelligently." See Faretta v. California, supra. Though "knowingly and intelligently" is the most common description of the requisite mental state, other descriptions also have been used without apparently suggesting a substantive difference. See e.g., Id. ("competently and intelligently"); Boyd v. Dutton, 405 U.S. 1, 92 S.Ct. 759, 30 L.Ed.2d 755 (1972)("voluntary and knowing"); Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8

L.Ed.2d 70 (1962)("intelligently and understandingly").

There must be "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) Moreover, this Court has warned the lower courts against "lightly assum[ing]" that the defendant has this state of mind. Id. It has in fact directed those courts to "indulge in every reasonable presumption against waiver." Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977), rehearing denied 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 240.

A waiver may not be presumed from a silent record. The evidence must show that the defendant was informed specifically of his right to the assistance of appointed or retained counsel and that he clearly rejected such assistance. See e.g. Piankhy v. Cuyler, 703 F.2d 728 (3d Cir. 1983);

People v. Feliciano, 93 Ill.App.3d 642, 49 Ill.Dec. 134, 417 N.E.2d 824 (1981); Rogers v. State, 156 Ga. App. 466, 274 S.E.2d 815 (1980).

In the instant case, petitioner was determined to present a defense based upon his innocence and entered a plea accordingly. He wanted and was entitled to the assistance of counsel. In substance and effect the Utah Supreme Court concluded that Petitioner waived not only the right to control the theory of his defense but right to the effective assistance of counsel in pursuing that theory.

In United States v. Marble, 940 F.2d 1543 (D.C.Cir.1991), the United States Court of Appeals, District of Columbia Circuit, overruled Whalem v. United States, 346 F.2d 812 (D.C.Cir 1965), and United States v. Wright, 627 F.2d 1300 (D.C. Cir.1980), under which the trial courts were said to have an obligation to see that issue of a

defendant's sanity became a part of the case "when there [was] sufficient question as to a defendant's mental responsibility at the time of the crime." Whalem at 817. The reported cases indicate that while Whalem was the law of the District of Columbia Circuit, trial courts appointed amicus counsel to make the case for sua sponte imposition of the insanity defense. See Mable, supra, at 1544.

In Marble the defendant's appointed counsel raised the possibility that the court should impose an insanity defense. The court appointed amicus counsel for the purpose of raising the issue. This procedure was following in apparent recognition of the defendant's right to the assistance of independent counsel who would advance the theory of defense which the defendant had chosen to pursue.

In the instant case, the Utah Supreme Court appears to be oblivious to this

concern.

While defense counsel may have considered the insanity plea a matter of tactics or strategy, it was in fact a usurpation of petitioner's constitutional right to control the theory of his defense. Waivers of the constitutional rights to control the general theory of his defense and to have the assistance of counsel in pursuing that defense cannot be found in petitioner's failure to object to "his counsel's actions in entering [a] plea" with which he was in disagreement. Appendix, p.A17.

Where dealing with matters which lie outside defense counsel's prerogative, the accused should not be prejudiced by conduct undertaken by his counsel in contravention of the defendant's desires. To hold that a criminal defendant must make a contemporaneous objection to conduct on the part of his counsel or lose the fundamental

right to control his defense and the right to the assistance of independent counsel in pursuing that defense is to conclude that a criminal defendant must be on guard on two fronts -- the government and defense counsel.

In order to conclude that petitioner knowingly and intentionally waived his right to control the theory of his defense, this Court must conclude that at the time he failed to voice objection to the entry of the alternative plea he knew and understood: (1) that he was forfeiting the opportunity to make any genuine presentation of his theory of defense -- innocence; (2) that counsel's theory of defense would undermine his credibility as a witness; (3) that the day would come when, notwithstanding the fact that he has just testified and denied any mental illness, his attorney would stand before his jury and argue that he was in fact mentally ill; and (4) that his

counsel's efforts would be divided between the advancement of his chosen defense and the insanity defense he did not wish to pursue.

Petitioner did not knowingly and intentionally waive his right to maintain control over his defense or his right to the assistance of independent counsel, nor should he be deemed to have forfeited these rights.

## CONCLUSION

For the foregoing reasons, petitioner requests that a Writ of Certiorari issue in this case for review of the decision of the Utah Supreme Court.

DATED this 22 day July, 1993.

Respectfully submitted,

/s/

GARY W. PENDLETON
Counsel of Record

# APPENDIX A

IN THE SUPREME COURT OF THE STATE OF UTAH

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State of Utah,
Plaintiff and Appellee,

v.

Maximillian Roberto Seale,
Defendant and Appellant.

No. 910010

FILED
February 24, 1993

Geoffrey J. Butler
Clerk

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Fifth District, Washington County
The Honorable J. Phillip Eves

Attorneys: R. Paul Van Dam, Annina M. Mitchell, Salt Lake City for plaintiff
Gary W. Pendleton, St. George, for defendant.

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ZIMMERMAN, Justice:

Maximillian Roberto Seale appeals his convictions of rape of a child, Utah Code Ann. §76-5-402.1, and six counts of aggravated sexual abuse of a child, id. § 76-5-404.1, all first degree felonies. He challenges the convictions on several grounds, including ineffectiveness of counsel, improper admission of evidence,

violation of his constitutional right to confrontation, and insufficiency of evidence. We affirm.

In reviewing a jury verdict, we view the evidence and all reasonable inferences drawn therefrom in a light most favorable to the verdict. State v. Hamilton, 827 P.2d 232, 233 (Utah 1992); State v Gardner, 789 P.2d 273, 285 (Utah 1989), cert. denied, 494 U.S. 1090 (1990). We recite the facts accordingly. Hamilton, 827 P.2d at 234.

Alice Chapman and her three daughters, J.W., the oldest, P.W., and one younger girl, moved in with Seale at his Hurricane, Utah, home in the spring of 1987. At that time, all three girls were under the age of ten. The relationship between Chapman and Seale lasted until January of 1989, when Chapman and her daughters moved out.

In the summer of 1989, the three girls visited their father, who was divorced from Chapman and living in Jerome, Idaho. During

their stay, J.W. and P.W. complained to Cheryl VanLeishout, their father's sister, that Seale had sexually molested them. VanLeishout took J.W. to e examined by Dr. Elizabeth Sugden, who found that J.W.'s vagina had physical manifestations consistent with sexual intercourse that could have occurred at any time between two weeks and several years prior to the examination. J.W. told Dr. Sugden that Seale had sex with her. Two days later, the girls' father took J.W. and P.W. to see a social worker, Mary Riggs. Riggs interviewed the two girls separately in the presence of a female police officer. The interviews were videotaped.

Seale was arrested and ultimately charged with six counts of aggravated sexual abuse of a child, one count of forcible sodomy on a child, and one count of rape of

a child.[1] The court appointed defense counsel, who later moved to commit Seale to the Utah State Hospital for a psychiatric evaluation. The court granted the motion. The evaluation showed that Seale had a treatable psychotic disorder. The court found him incompetent to proceed and ordered that he be committed to the hospital for treatment. After six months of treatment, hospital personnel advised the court that Seale was competent to stand trial.

At trial, J.W. was the prosecution's first witness. She testified that Seale had sexually abused her on three occasions, each of which she explained in detail. The first incident took place when she was in the bathtub and Seale was washing her with a washcloth. She testified that Seale "put the washcloth in my bottom." The next incident occurred when J.W. and her two

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[1]The sodomy charge was later dismissed.

sisters were sleeping on the living room floor. J.W. testified that Seale came into the room and had intercourse with her. In the third incident, Seale told J.W. to go upstairs to an unfinished attic. There, Seale pulled down her panties and touched her "bottom" with his fingers. J.W. also testified that she told her mother about each incident after it occurred. She said that she was eleven years old when the incidents took place.

P.W. took the stand next. She testified that she had lived with Seale the previous year and knew the difference between a "good touch" and a "bad touch." When asked if she had ever been touched with a "bad touch," P.W. responded, "I don't know." She then proceeded to answer "I don't remember" to every question asked about whether Seale had touched her and whether she had told anyone that he had. P.W. testified that she was eleven years

old, which would have made her ten when the incidents occurred.

At this point, the jury was excused so that the court could consider the admissibility of Mary Riggs' videotaped interview with P.W., which the defense had sought to exclude by a motion in limine prior to trial. The judge, who had viewed the videotape earlier, heard testimony from Riggs and then considered whether the videotape met the requirements of section 76-5-411 of the Code, Utah Code Ann. §76-5-411, and rule 15.5 of the Utah Rules of Criminal Procedure, Utah R. Crim. P. 15.5. The judge made tentative findings, but decided to wait until he heard more evidence to make a final ruling.

Next the girls' father testified, the prosecutor read Dr. Sugden's testimony into evidence, and Cheryl VanLeishout recounted the events and conversations she had with J.W. and P.W. prior to trial. The

prosecution then questioned Alice Chapman, the girls' mother. She testified that J.W. had told her about only one incident of abuse. According to Chapman, J.W. told her that Seale "did an Indian dance over her while she was asleep" and touched her breasts. However, Chapman stated that J.W. specifically denied being touched anywhere else. Chapman also testified that J.W. had told her that Seale washed her back in the bathtub, but that J.W. did not say anything about being touched on any other part of her body.

The prosecutor asked a series of questions challenging Chapman's credibility. Chapman testified that J.W. was currently living with the girls' father pursuant to a court order issued as a result of the divorce. Chapman admitted that although P.W. was still living with her, she was afraid her ex-husband would be awarded custody of P.W. as well. Chapman denied

that she had encouraged P.W. "to forget things" in an effort to retain custody. Finally, she denied that her sister, Elizabeth Jones, had talked to her about Seale's possible abuse of the children or that she had asked Jones to lie on the stand.

Jones testified next. When the prosecutor asked her if the girls had said anything to her, defense counsel objected on hearsay grounds but was overruled on the basis that any statements elicited would be "prior to consistent statements." Jones then testified that J.W. told her that Seale had "touched her bottom" and breasts and that J.W. had told her mother about it. On cross-examination by defense counsel, Jones said that P.W. also told her that Seale had "touched" P.W. on her "bottom." When asked about her conversations with Chapman, Jones said that she had told Chapman that Seale had molested the children, but that Chapman

claimed that nothing had happened. Jones also testified that Chapman called her the night before she was to testify and asked her not to say anything in court.

After Jones stepped down, the judge made certain findings and then ruled that the videotaped interview of P.W. was admissible under section 76-5-411 of the Code and Utah Rule of Criminal Procedure 15.5. The videotape subsequently was played for the jurors, who followed along with a written transcript. In the videotape, P.W. related four instances of sexual abuse. One occurred when she was in her bedroom putting on her nightgown. P.W. stated that Seale touched her "bottom" or "private spots," which she indicated as her genitals. Two similar incidents took place when she was taking a bath. The fourth incident occurred when everyone else in the house had gone to the store. P.W. said that Seale pushed her onto his bed and, not allowing her to leave,

again fondled her. After the videotape was shown, the prosecution rested.

During Seale's case-in-chief, defense counsel first questioned Riggs about the videotaped interview with P.W., who was never recalled to the stand. After several other witnesses testified, the defense called Dr. Robert Howell of the Utah State Hospital.

Relying on psychiatric evaluations completed when Seale first entered the hospital, Dr. Howell testified that Seale was mentally ill at the time of the alleged abuse of J.W. and P.W. When asked if Seale was capable of forming the intent to commit the alleged offenses, Dr. Howell gave a contradictory response. At one point, he stated that there was a "real possibility" that Seale's actions were the result of mental illness. At another point, he testified that he did not mean to say that Seale was incapable of forming a conscious

objective to carry out the acts. On cross-examination by the prosecution, Dr. Howell stated that he believed that Seale had used hallucinogenic drugs and that those types of drugs could produce behavior similar to that manifested as the result of mental illness.

Seale also testified, flatly denying that he had used illegal drugs, that he was or had been mentally ill, and that he had molested the children. In rebuttal, the prosecutor called J.W., who testified that when she lived with Seale, he and her mother used marijuana on a weekly basis.

At the close of evidence, the jury was instructed that it could find Seale not guilty, not guilty by reason of insanity, guilty, or guilty and mentally ill for each of the seven counts submitted to them. During closing argument, defense counsel argued that Seale had been mentally ill during the incidents of abuse. The jury, however, returned verdicts of guilty on all

counts. Later, with new counsel, Seale moved for a new trial, which was denied. He appealed, and we now consider his claims of error.

Seale first claims that he was deprived of the effective assistance of counsel guaranteed him by the Sixth Amendment to the United States Constitution because his trial counsel improperly asserted an insanity defense that prejudiced the jury against him. To establish that his trial counsel was ineffective under the Sixth Amendment, Seale must show (i) that his counsel's performance falls below the standard of reasonable professional assistance, and (ii) that but for counsel's deficient performance, there is a reasonable probability that the verdict would have been more favorable to him. Strickland v. Washington, 466 U.S. 668, 690 (1984); State v. Verde, 770 P.2d 116, 118-19, 124 n.15 (Utah 1989); State v. Lovell, 758 P.2d 909

913 (Utah 1988).

Seale argues that his trial counsel was ineffective because there was no basis for asserting an insanity defense.[2] He claims that throughout the pretrial proceedings, the trial, and the posttrial proceedings, he steadfastly maintained his innocence and denied that he was mentally ill. He claims that his trial counsel nevertheless persisted in asserting an insanity defense. By calling Dr. Howell to the stand and asking him questions about Seale's sanity, Seale argues, his trial counsel undermined his credibility and opened the door to cross-examination about his drug abuse, all

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[2]The affirmative defense of insanity was abolished by chapter 49, section 1 of the Utah Insanity Defense Act. 1983 Utah Laws ch. 49, § 1 (codified as amended at Utah Code Ann. § 76-2-305). Section 76-2-305(1) still recognizes, however, that mental illness can provide a defense if, as a result of the mental illness, the defendant lacked the mental state required for the offense charged. Utah Code Ann. § 76-2-305(1).

of which prejudiced the jury against him.

We find that Seale's trial counsel's decision to assert an insanity defense did not fall below the standard of reasonable professional assistance. It is well established that counsel will not be found ineffective when the actions complained of are the result of a "legitimate exercise of professional judgment in the choice of trial strategy." State v. Bullock, 791 P.2d 155, 160 (Utah 1989), cert. denied, 110 S. Ct. 3270 (1990). In the instant case, we think that a reasonable attorney under the same circumstances could have asserted the insanity defense. We rely on the following facts.

After his arrest, the trial court determined on the basis of an extensive psychiatric evaluation that Seale was incompetent to stand trial. The diagnosis was a serious mental illness in the form of a schizophrenic disorder with periods of

manic depression. Subsequently, he was committed to a hospital for treatment, and after six months of therapy, including the use of mood-stabilizing and antipsychotic drugs, he was determined to be competent to stand trial. In a report to the court, a copy of which was sent to Seale's trial counsel, a hospital psychologist and a doctor opined that Seale had been mentally ill during the time the alleged abuse occurred. These facts provide a sufficient basis from which a reasonable attorney could choose to assert an insanity defense on behalf of his or her client.

Thus, it is reasonable to conclude that Seale's trial counsel was pursuing a legitimate trial strategy in calling Dr. Howell to the stand and asking him questions about Seale's sanity. We also note that Dr. Howell's testimony provided sufficient evidence for the insanity defense to be submitted to the jury. Although Dr.

Howell's testimony was contradictory, he did say at one point that there was a "real possibility" that Seale was mentally ill when the abuse took place. The jury was entitled to accept this statement and find that Seale was mentally ill at the time of the offense, see State v. James, 819 P.2d 781, 784 (Utah 1991), but obviously the jury did not. Seale's ineffectiveness claim fails.

Another ground for rejecting Seale's ineffectiveness claim rests on the fact that Seale entered an alternative plea of not guilty by reason of insanity. Apparently, Seale is now arguing that he disagreed with the plea at the time it was entered. We find this position to be untenable and reject his attempt to now claim ineffectiveness based upon his counsel's pursuit of that plea during trial. Seale has not shown, nor can we find, any indication in the record that he objected to

the plea when it was made. We acknowledge that Seale initially told the trial judge that he wished to enter a not guilty plea and that it was his trial counsel who then requested an alternative plea of not guilty by reason of insanity. However, Seale did not object to the request, he signed the plea affidavit, and he initialed the paragraph requesting the alternative plea.[3] Under these circumstances, Seale cannot now challenge his counsel's actions in entering the plea of not guilty by reason of insanity and pursuing this theory at trial. See State v. Medina, 738 P.2d 1021, 1023 (Utah 1987).

Seale next claims that the trial judge erred by admitting the videotape of P.W.'s interview. Seale argues that the judge did

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[3]Seale now argues that the written plea was impermissibly altered to include the insanity plea. The hearing transcript indicates, however, that the alteration was at least done with Seale's knowledge.

not comply with section 76-5-411 of the Code or rule 15.5 of the Utah Rules of Criminal Procedure, both of which require the judge, under certain circumstances, to make specific findings prior to admitting out-of-court statements of a child sexual abuse victim. He further argues that the admission of the videotape violated his Sixth Amendment right to confront witnesses testifying against him.

Before reaching the merits of these arguments, we describe the findings made by the trial court in admitting the videotape. The trial judge made two sets of findings. Before making the first set, he viewed the videotape and heard testimony from Mary Riggs, the interviewer in the videotape, outside the presence of the jury. In these first findings, the judge noted that portions of P.W.'s videotaped testimony were consistent with other facts: P.W. realized that she lived in Hurricane for a period of

time with Seale, her sisters and her mother. The judge also stated:

> I see certain evidences of reliability in the testimony of [P.W.] as given on the videotape. For example, intrinsically, . . . her story holds together. She tells the same story throughout the interview. She's consistent in her statements as to what happened and when. She does not appear to be subject to being led during the interview. In fact, the questions are always asked in multiple form, giving her an opportunity to correct the questioner or to make a choice of several options before she responds.
>
> There's no evidence in that videotape . . . that she was under any pressure or being coached or

led in any way as she made her statements. She doesn't appear to be under any duress. She appears to be responsive and not under any medication or in any way incapable of handling the interview and making responses to the questions. So intrinsically, . . . the tape appears to be reliable. There are no fantastic statements such as we find in [State v. Lenaburg, 781 P.2d 432 (Utah 1989)].

If that's what is required to allow one of these statements to come in, then . . . it would appear to me that reliability has been established.

But I think more than that is required. I think the court has to look at the extrinsic evidence of reliability as well. . . . [T]he only extrinsic evidence of

> reliability that I've seen is that [P.W.'s] statement as to where she was living and who she was living with and the types of abuse that she claims to have suffered during that process or during that time are about the same as what [J.W.] has testified here that she went through.
>
> It seems to me there are a lot of other areas, though, that should be explored before I make a determination as to whether or not the burden of demonstrating the extrinsic reliability of those statements--before I'm required to make that determination.

The judge subsequently hears several more witnesses whose testimony carried over to the next day. Then he reconsidered the admissibility of the tape under section 76-5-411(1)(c) and rule 15.5. In his second

set of findings, the judge stated:

> I've now heard testimony from several players in this drama, including the older child [J.W.], which tend to corroborate many of the statements made by [P.W.] in this videotape as to where she was living, who she was living with, and the general time frame. The fact that there was abuse going on in the home is also corroborative. [J.W.] has indicated she has been abused also. . . . Everything that is possible to corroborate from her statement, short of having an eyewitness to the sexual abuse, has been corroborated.
>
> I'm satisfied that the statement is reliable and trustworthy, and that the interests of justice would be served by allowing the jury to

view the videotape. And therefore, I'm going to allow that to happen.

Likewise, I make the finding under 76-5-411, that it is in the . . . interests of justice that this tape be shown. I've . . . considered the age and maturity of the child both at the time she made the statement and now, the nature and duration of the abuse as alleged by [P.W.] in this tape, and the relationship of her to the offender, as well as the reliability of the assertion that [P.W.] made. And considering all those things, . . . it is in the . . . interests of justice that the tape be shown to the jury.

These findings were made orally on the record.

Seale challenges the trial court's

admission of the tape on essentially three grounds. First, he claims that the judge failed to follow section 76-5-411(1)(c) and rule 15.5(1)(g) by focusing on the lack of evidence showing unreliability rather than on the presence of evidence affirmatively showing reliability. Second, he claims that the judge improperly considered evidence corroborative of the charges against him in making the admissibility determination required by section 76-5-411(2). Seale argues that such consideration is contrary to our ruling in -State v. Matsamas-, 808 P.2d 1048, 1054 (Utah 1991), which precluded the consideration of such evidence. Finally, Seale claims that the judge's consideration of extrinsic evidence corroborative of the charges against him as also improper under the Confrontation Clause of the Sixth Amendment as interpreted in Idaho v. Wright, 110 S. Ct. 3139 (1990). He argues that under Wright, the reliability of

an out-of-court statement made by a constitutionally unavailable declarant must be determined on the basis of the statement's inherent trustworthiness, not by extrinsic evidence corroborative of the charges. Id. at 3150. We consider each of Seale's arguments in order.

We turn first to his claim that the trial court improperly considered the lack of evidence demonstrating that the out-of-court statement was unreliable, rather than the presence of evidence affirmatively demonstrating reliability, as required by section 76-5-411(2). As a threshold matter, we consider the State's contention that Seale waived this claim by not raising it at trial. See Utah R. Evid. 103(a)(1); State v. Eldredge, 773 P.2d 29, 34-35 (Utah), cert. denied, 493 U.S. 814 (1989). Although Seale timely objected to the admission of the videotape, he claimed constitutional error rather than failure to comply with

section 76-5-411 and rule 15.5. However, Seale did raise the issue in this motion for a new trial, and the court addressed the issue on the merits in denying the motion. Because the court considered the alleged error rather than finding it waived, Seale's right to assert the issue on appeal was resuscitated. See State v. Johnson, 821 P.2d 1150, 1161 (Utah 1991); Matsamas, 808 P.2d at 1053.

We begin our analysis of the merits of Seale's claim by considering the controlling statutory language. Section 76-5-411 states in pertinent part:

> (1) Notwithstanding any rule of evidence, a child victim's out-of-court statement regarding sexual abuse of that child is admissible as evidence although it does not qualify under an existing hearsay exception, if:
>
> . . .;

(c) the statement qualifies for admission under Rule 15.5(1), Utah Rules of Criminal Procedure.

(2) Prior to admission of any statement into evidence under this section, the judge shall determine whether the interest of justice will best be served by admission of that statement. In making this determination the judge shall consider the age and maturity of the child, the nature and duration of the abuse, the relationship of the child to the offender, and the reliability of the assertion and of the child.

Utah Code Ann. § 76-5-411. Rule 15.5(1) states in pertinent part:

In any case concerning a charge of . . . sexual offense against a child, the oral

> statement of a victim . . . may be recorded . . . , and upon motion and for good cause shown is admissible as evidence in any court proceeding regarding the offense if all of the following conditions are met:
>
> . . . ;
>
> (g) The court views the recording before it is shown to the jury and determines that it is sufficiently reliable and trustworthy and that the interest of justice will best be served by admission of the statement into evidence . . . .

Utah R. Crim. P.15.5(1). Because section 76-5-411 explicitly incorporates rule 15.5(1), all the requirements of both provisions must be met for the proffered out-of-court statement to be admitted.

Although both provisions are couched in slightly different terms, both seek the same end--a determination that proffered out-of-court statements are sufficiently reliable and trustworthy to be admitted. See State v. Nelson, 725 P.2d 1353, 1355-56 n.3 (Utah 1986).[4]

Section 76-5-411(2) lists seven specific factors courts are required to consider in making the admissibility determination: (1) the victim's age, (2) the victim's maturity, (3) the nature of the abuse, (4) the duration of the abuse, (5) the relationship of the victim to the

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[4]In Nelson, we construed a previous version of section 76-5-411(2) that was amended to its present form in 1985. The previous and current versions are substantially the same. Nelson, 725 P.2d at 1355-56 & nn.2-3. We note that since Seale's trial, this court and the court of appeals have further clarified the requirements in section 76-5-411 and rule 15.5(1) that trial judges must follow in making the findings required by those provisions. See Matsamas, 808 P.2d at 1051; State v. Reiners, 803 P.2d 1300, 1302 (Utah Ct. App. 1990).

offender, (6) the reliability of the statement sought to be admitted, and (7) the reliability of the child. In Nelson, we said that this list of factors is not exclusive; rather, it is "intended to prompt a comprehensive inquiry into all the circumstances surrounding the child's out-of-court statement in order to determine its reliability." 725 P.2d at 1356 n.3 (emphasis added) (cited in Matsamas, 808 P.2d at 1051). Thus, even though a court "must enter findings and conclusions regarding each of the factors listed in the statute to explain its reasons for admitting or excluding the testimony," id., the factors serve only as a starting point for a plenary review of the circumstances surrounding the making of the out-of-court statement. Consequently, trial courts should not consider the statutory factors mechanically, see Matsamas, 808 P.2d at 1052; State v. Reiners, 803 P.2d 1300, 1306-

07 (Utah Ct. App. 1990), and on review, the sufficiency of a trial court's findings should not hinge on mere technical adherence to the statutory factors.

With this in mind, we have reviewed the transcript of the trial court's consideration of the videotape, and we are satisfied that the trial court performed the comprehensive inquiry required by section 76-5-411(2) and Nelson. Although the trial court's stated findings regarding the statutory factors were less complete than we would like, we cannot say that, considering the record as a whole, the trial judge erred in making the reliability determination. The record indicates that the judge carefully examined the circumstances in which the statement was made. After viewing the videotape and listening to the live testimony of both P.W. and the interviewer, the judge made tentative findings but declined to make a ruling until he heard

several more witnesses. After further testimony, which continued into the next day, the judge made another set of findings and then ruled the tape admissible.

More importantly, we conclude that the trial court's recorded findings are sufficient under both section 76-5-411 and Nelson. All seven statutory factors are addressed in the court's findings. Although three of the factors--the age of the child, her relationship to Seale, and the exact nature and duration of the abuse--were addressed by merely quoting the statutory language regarding these factors, the facts pertinent to and supportive of the court's conclusion to admit the videotape are readily identifiable from the record. This is not a case like Matsamas, where the trial judge did not consider any independent evidence on the question of the admissibility of the out-of-court statement, but merely recited section 76-5-411's

requirements and inappropriately relied on the ground that the statement might be helpful in determining what had occurred--a plainly tautological basis for finding it reliable. See 808 P.2d at 1052.

The most serious problem with the trial court's findings in the present case is that no explicit reference was made to P.W.'s maturity and reliability in general, although the judge did make detailed findings respecting her maturity and reliability as she appeared in the videotape. See State v. Webb, 779 P.2d 1108, 1113-14 (Utah 1989)(opinion of Zimmerman, J.). However, the trial judge did have the opportunity to observe P.W.'s maturity and reliability when she testified on the stand, and he said that he took those factors into account in deciding to admit the videotape. In sum, we hold that the trial court did not err in finding the evidence admissible as required by section

76-5-411 and Nelson.[5]

Seale's next claim is that the judge improperly considered evidence corroborative of the charges against him in making the admissibility determination required by section 76-5-411(2). For this challenge, Seale relies primarily on our decision in Matsamas, 808 P.2d 1048.

In Matsamas, we construed the requirements of section 76-5-411 to be consistent with those established by the United States Supreme Court in Wright, 110 S. Ct. 3139. In Wright, the Court held that in determining the reliability of out-of-court hearsay statements, courts are prohibited under the Confrontation Clause of the Sixth Amendment from considering

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[5]Seale also argues that the trial court erred in not making written findings. See State v. Van Matre, 777 P.2d 459, 462 & n.2 (Utah 1989). We see no reason why oral findings, duly recorded, do not satisfy that requirement. Consequently, the court did not err in making oral findings on the record.

extrinsic evidence corroborative of the offense with which the defendant is charged. Id. at 3150. Guided by this ruling, we held in Matsamas that under section 76-5-411(2), Utah courts may not consider extrinsic corroborative evidence in determining the admissibility of hearsay statements. 808 P.2d at 1054. Furthermore, because section 76-5-411(2) does not distinguish between cases where the victim is available to testify and those where the victim is not, we held that the bar to corroborating evidence must apply to both. Id. Although the impetus for our decision was a desire to construe section 76-5-411 as constitutional, we said that extrinsic corroborating evidence could not be considered under section 76-5-411(2) as a matter of statutory interpretation. See id.

In the instant case, in determining the reliability of P.W.'s statements in the videotape, the trial judge considered J.W.'s

testimony that Seale sexually abused her during the same period and in the same manner as the prosecution claimed Seale had abused P.W. Plainly, this extrinsic evidence tends to corroborate Seale's sexual abuse of P.W. Therefore, we hold that the trial judge's ruling violates section 76-5-411(2), as interpreted in Matsamas. However, we find that the error is harmless. See Hamilton, 827 P.2d at 240; State v. Larson, 775 P.2d 415, 419 (Utah 1989); Verde, 770 P.2d at 120. For the reasons discussed below, we think that the trial judge would have admitted the videotape even if he had restricted his inquiry to the appropriate subject matter.

Before considering the extrinsic corroborating evidence, the trial judge considered the circumstances surrounding the making of the videotaped statements. The judge observed that P.W. told the same story throughout the interview and that she was

consistent as to what happened and when. He also noted that she did not appear to be led during the interview and that the questions were always asked in multiple form, giving her the opportunity to correct the questioner or choose one of several options before responding. Finally, the judge observed that P.W. did not appear to be coached or under any duress during the interview and that she did not make any fantastic statements. Based upon these conclusions alone, the judge found that reliability had been established. While the trial court might have considered other relevant factors, such as the circumstances leading to the interview and whether P.W. had a motive to fabricate her story, we think the factors considered are sufficient under Matsamas and Wright to support the judge's finding. Consequently, we conclude that the judge's consideration of extrinsic corroborating evidence was harmless error.

Seale's last attack on the admission of the videotape is based on the Confrontation Clause of the Sixth Amendment.[6] Seale argues that he was not able to effectively cross-examine P.W. about the statements she made on the videotape and, therefore, that P.W. was constitutionally "unavailable." See Wright, 110 S. Ct. at 3146-47. Because P.W. was unavailable, he contends, Wright prohibits the trial court from considering extrinsic corroborative evidence in determining the reliability of P.W.'s videotaped statements. See id. at 3150.

Seale advances two theories in arguing that P.W. was unavailable. First, he

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[6]Seale also claims that the admission of the videotaped statement violates his right to confrontation guaranteed by article 1, section 12 of the Utah Constitution. However, because he provides no separate argument or analysis under that provision, we address his claim only under the Sixth Amendment. See Webb, 779 P.2d at 1111 n.4 (opinion of Zimmerman, J.); State v. Lafferty, 749 P.2d 1239, 1247 n.5 (Utah 1988).

contends that P.W. was unavailable because of her "total failure of recollection at trial." Second, he quotes language in Matsamas in which we observed that Wright seemed to suggest that children, even if present at trial, might be found unavailable under the Sixth Amendment because of their lack of maturity. Neither argument is persuasive.

Seale's first theory is foreclosed by the United States Supreme Court's decision in United States v. Owens, 484 U.S. 554 (1988). In that case, the Court considered whether an out-of-court statement identifying the defendant could be admitted consistent with the Confrontation Clause when memory loss prevented the declarant from testifying as to the basis for the identification. The Court held that the statement was admissible, reasoning, "'The Confrontation Clause guarantees only "an opportunity for effective cross-examination,

not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."'" Id. at 559 (emphasis in original) (quoting Kentucky v. Stincer, 482 U.S. 730, 739 (1987) (in turn quoting Delaware v. Fernsterer, 474 U.S. 15, 20 (1985))). As we explained in Nelson: "The essence of the confrontation right is the opportunity to have an accusing witness in court and subject to cross-examination. . . . If the witness is physically present and subject to cross-examination . . . these values would seem to be satisfied." 725 P.2d at 1356, quoted in Van Matre, 777 P.2d at 463; accord Webb, 779 P.2d at 112-13 (opinion of Zimmerman, J.); State v. Lenaburg, 781 P.2d 432, 438 (Utah 1989) (Zimmerman, J., concurring, joined by Stewart, J.). Thus, Seale cannot rely on P.W.'s lack of memory as a basis for arguing that she was constitutionally unavailable.

Seale's second theory, that P.W. was

unavailable because she was a child, also fails. Our comment in Matsamas concerning Wright was only an observation about where the Supreme Court may be heading in the Sixth Amendment area, not about where it has been. We made this observation because it supported our interpretation of section 76-5-411 as prohibiting the consideration of extrinsic corroborating evidence. We do not read Wright as holding that children, even if present, may be found to be constitutionally unavailable any more readily than adults. Moreover, we note that Seale's argument is at odds with this author's opinion in Webb, which said that a two-year-old child who could have come to trial must be considered available absent specific findings made by the trial court as to the child's inability to give competent testimony because of her immaturity. 779 P.2d at 1113-14 (opinion of Zimmerman, J.); accord United States v. Spotted War Bonnet,

933 F2d 1471, 1474 (8th Cir. 1991), cert. denied, 112 S. Ct. 1187 (1992); see also Nelson, 725 P.2d at 1356. In sum, because we find no merit to Seale's argument that p.W. was constitutionally unavailable, we conclude that Seale's right to confrontation was not violated when the court admitted P.W.'s out-of-court statements.

Seale next argues that Elizabeth Jones's testimony repeating statements J.W. and P.W. made to her was improperly admitted under rule 801(d)(1)(B) of the Utah Rules of Evidence. Rule 801(d)(1)(B) allows an out-of-court statement to be admitted if (i) "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement," and (ii) the statement is "consistent with his [or her] testimony and offered to rebut an express or implied charge against him [or her] of recent fabrication or improper influence or motive." Utah R. Evid. 801(d)(1)(B).

The relevant facts follow: Under questioning by the prosecution, Chapman, the girls' mother, contradicted J.W.'s testimony that she had been molested by Seale on three different occasions, one involving intercourse, and that after each incident, she told her mother. Chapman testified that J.W. had reported to her only one instance of abuse, which involved the fondling of J.W.'s breasts. After Chapman testified, the prosecution called Chapman's sister, Jones. When Jones was asked about J.W.'s statements to her regarding Seale, the defense objected on "the same bases as the objection yesterday regarding the social worker from Idaho." The objection the defense was referring to was a generic hearsay objection that had been made the previous day to testimony elicited from Mary Riggs. The prosecution responded that the state was seeking to admit the statements to "probe the credibility of Alice [Chapman]."

The judge overruled the objection, ruling that "these statements are admissible as prior consistent statements, and therefore, . . . admissible for the truth of the matter asserted, the credibility of the victims having been questioned." Jones then testified about a number of statements P.W. and J.W. made to her.

Seale argues that these statements were improperly admitted as prior consistent statements under rule 801(d)(1)(B) because the rule does not allow a party to introduce an out-of-court statement to rebut contradictory evidence that had been adduced by the same party.[7] Seale also argues that P.W.'s out-of-court statements should not

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[7]Cheryl VanLeishout also testified as to statements J.W. and P.W. made to her regarding the abuse. On appeal, Seale does not challenge VanLeishout's testimony as to these statements. The jury was cautioned by the court that VanLeishout's testimony was being offered, not for the truth of the matter contained in the statements, but to show that complaints were made to her.

have been admitted under the rule because they did not, at that point, contradict any testimony that P.W. had given. (The videotaped interview with P.W. had not yet been admitted.)[8]

Before reaching the merits of this claim, we consider the State's assertion that Seale waived his rule 801(d)(1)(B) claim because his objection was not sufficiently specific under rule 103(a)(1) of the Utah Rules of Evidence. Utah R. Evid. 103(a)(1); see Eldredge, 773 P.2d at

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[8]Seale further contends that the statements were not admissible under section 76-5-411 because the court failed to make the requisite admissibility determination. Seale did not argue that the statute superseded rule 801(d)(1)(B), but rather assumed that it was an alternative provision for admitting out-of-court statements. But see State v. Lamper, 779 P.2d 1125, 1129 (Utah 1989). Because we find that any error in admitting P.W.'s and J.W.'s statements to Jones under rule 801(d)(1)(B) was harmless, we do not need to reach the question whether section 76-5-411 supersedes or is an alternative to the rules of evidence or whether section 76-5-411 was violated in admitting those statements.

34-36. Although Seale's objection was vague, the judge clearly understood it when he ruled that the statement was admissible as a prior consistent statement. Rule 103(a)(1) allows trial counsel to forego explaining his or her grounds of objection if the specific ground is "apparent from the context," which it obviously must have been.

Returning to Seale's challenge, we find that even if the statements were improperly admitted, the error was harmless. See Hamilton, 827 P.2d at 240; Larson, 775 P.2d at 419; Verde, 770 P.2d at 120. In regard to Seale's convictions for rape and aggravated sexual abuse of J.W., we need not look any further than the evidence supporting those convictions to conclude that any error was harmless. The significance of J.W.'s statements recounted by Jones to the jury's verdict finding Seale guilty of raping and sexually abusing J.W. is minor compared with the substantial

evidence supporting the verdict. See Hamilton, 827 P.2d at 240; State v. Hackford, 737 P.2d 200, 205-06 (Utah 1987). J.W. herself testified at length and in detail about the three incidents from which the charges against Seale arose. Dr. Sugden testified that J.W. showed physical signs of prior sexual intercourse and that J.W. told her that Seale had sexual intercourse with her.[9] In light of this evidence, we cannot say that Jones's recount of J.W.'s statements to her, assuming it was error, prejudiced Seale with regard to his

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[9]We acknowledge that Dr. Sugden's testimony, which was paraphrased and read into the record by stipulation of counsel, is inconsistent with regard to whether Seale was the perpetrator. At one point, the stipulated testimony states, "[J.W.], the victim, described to Dr. Sugden what had occurred, alleging that the defendant had sexual intercourse with her." Elsewhere, it states, "[J.W.] did not disclose the name of the perpetrator to Dr. Sugden." Because we view the evidence in a light most favorable to the verdict, Hamilton, 827 P.2d at 233; Gardner, 789 P.2d at 285, we resolve this inconsistence in favor of the conviction.

convictions for the rape and aggravated sexual abuse of J.W.

The potential for prejudice in regard to Seale's conviction of the aggravated sexual abuse of P.W. is more troublesome. The evidence supporting Seale's convictions for that offense is not as strong. However, it is at least sufficient to tilt our consideration of prejudice in the State's favor. We have held that the videotape of P.W.'s interview was properly before the jury. In the videotape, P.W. thoroughly described Seale's sexual abuse of her. On the stand, P.W. did not deny the truth of her videotaped statements; rather, she simply said that she could not remember whether she had been sexually abused. We do not rely, however, solely on the weight of this evidence to find no prejudice. We also rely on the lack of probative value of P.W.'s statements to Jones that Jones related during direct examination.

Our review of the record indicates two exchanges between Jones and counsel that may have been prejudicial. The first took place during the prosecution's direct examination of Jones. During this exchange, Jones made several statements with prejudicial potential. Some statements reflected P.W.'s fear of Seale. For example, Jones testified that P.W. told her that she was scared of Seale and did not want to return to Utah to live with him. These statements do not necessarily have anything to do with sexual abuse. We acknowledge that they may create the inference that sexual abuse was occurring, primarily because they were repeated in the context of a trial for sexual abuse, but we do not find the inference strong enough to prejudice the jury.

Jones also testified on direct examination that Seale had some physical contact with P.W.:

A. [P.W.] didn't say as much as [J.W.], but she said that he -- she was scared of him, and that he'd also touched her. But she had said that -- well, she didn't say as much that he'd touched her in the privates and the -- well, the breasts, I guess you can call it. But they didn't have anything.

Q. [P.W.] said that?

A. Well, [J.W.] did too. But I don't know if you call that privates too. But --

Q. Did -- Did [P.W.] say that as well?

A. Both of them did at that time. And that's when I told Alice that Max was hurting the girls . . . .

. . . .

Q. Did you tell Alice specifically what the girls had told you?

A. Yes. I told her that they said he'd touched them.

Again, although this line of questioning raises an inference of sexual abuse, it does not establish that any sexual abuse actually occurred. In addition, P.W. herself testified that Seale had helped her bathe by washing her back. Consequently, the statements that P.W. made to Jones reporting some physical conduct with Seale are largely consistent with P.W.'s own testimony.

The second exchange that may have prejudiced the jury occurred during defense counsel's cross-examination of Jones. Jones testified, inter alia, that P.W. "said that he'd touched her bottom." Unlike the other hearsay statements elicited by the prosecution during Jones's direct

examination, we think that this testimony could have been prejudicial. However, in light of P.W.'s videotaped statements and the fact that P.W. did not deny on the stand that the abuse occurred, we cannot say that even if the statements adduced on cross had been excluded, our confidence in the jury's verdict finding Seale guilty of sexually abusing P.W. is undermined. See Hamilton, 827 P.2d at 240. Therefore, we hold that any error that may have occurred as the result of these portions of Jones's testimony was harmless.

Seale's final argument is that the evidence is insufficient to support his convictions for the aggravated sexual abuse of P.W. He claims that the evidence is insufficient as a matter of Utah law and as a matter of due process under the Fourteenth Amendment of the federal Constitution. The State essentially concedes that the only affirmative evidence supporting Seale's

convictions for the aggravated sexual abuse of P.W. is the videotape of P.W.'s interview. Thus, the only question before us is whether Seale can be convicted solely by a videotaped out-of-court statement consistent with Utah law and federal due process.

We conclude that under the narrow circumstances presented by this case, the videotaped interview is sufficient to sustain his convictions under both state law and the federal Constitution. We rely on several bases. First, P.W. did not deny or recant what she told the interviewer in the videotape. Thus, this case is distinguishable from State v. Ramsey, 782 P.2d 480, 484 (Utah 1989), where a plurality of this court found an out-of-court oral statement, recanted at trial by the declarant, to be insufficient to support a conviction for sexual abuse of a child. Nor is the present situation served by the two

cases Seale cites in support of his insufficiency-of-evidence claim: Acosta v. State, 417 A.2d 373, 377 (Del. 1980), and Montana v. White Water, 634 P.2d 636, 638 (Mont. 1981). Even if both cases stand for the proposition that a conviction must be reversed if it was obtained solely on the basis of an out-of-court statement, the victims in both cases similarly denied that they made the statements and that the sexual abuse had occurred. Acosta, 417 A.2d at 377; White Water, 634 P.2d at 637-38. In short, Seale has not cited any authority for his assertion, and our research suggests that there is none.

Second, no evidence was adduced at trial that contradicts the statements P.W. made on the videotape other than Seale's testimony. Because the videotape was appropriately admitted as substantive evidence, the jury was fully entitled to weigh the credibility of P.W.'s videotaped

statements and her testimony on the stand against Seale's contradictory testimony and to decide who was telling the truth. See James, 819 P.2d at 784; State v. Hopkins, 782 P.2d 475, 477 (Utah 1989).

Finally, we note that there is evidence from which the jury could have reasonably inferred that P.W.'s "loss of memory" was in response to her mother's pressure to keep the incidents quiet. Chapman testified that she was afraid of losing custody of P.W. to her ex-husband. More importantly, Chapman's sister testified that Chapman called her the night before trial and asked her not to say anything in court. The jury could have reasonably concluded that Chapman made a similar request to P.W. and that P.W. agreed.

Therefore, based on the foregoing evidence and reasonable inferences therefrom, see Hamilton, 827 P.2d at 236; State v. Booker, 709 P.2d 342, 345 (Utah

1985), we conclude that the evidence is sufficient to sustain Seale's conviction for the sexual abuse of P.W.[10]

Affirmed.

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WE CONCUR:

Gordon R. Hall, Chief Justice

Richard C. Howe, Associate Chief Justice

I. Daniel Stewart, Justice

Christine M. Durham, Justice

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[10]Seale also argues that the trial judge should have instructed the jury to consider the videotape of P.W.'s interview with caution. Because Seale failed to raise this issue at trial, his is precluded from raising it on appeal. Utah R. Crim. P. 19(c); State v. Emmett, 839 P.2d 781, 785 (Utah 1992); Eldredge, 773 P.2d at 34-35.

# APPENDIX B

SUPREME COURT OF UTAH

STATE OF UTAH

SALT LAKE CITY, UTAH

May 28, 1993

OFFICE OF THE CLERK

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St. George, Ut, 84770

State of Utah,
Plaintiff and Appellee,
v. No. 910010
Maximillian Roberto Seale, 891502035
Defendant and Appellant.

THIS DAY, Petition for Rehearing having been heretofore considered, and the Court being sufficiently advised in the premises, it is ordered that a rehearing be, and the same is, denied.

Geoffrey J. Butler
Clerk